

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

AKRON ZOOLOGICAL PARK¹

Employer

and

Case No. 8-RC-16589

TEAMSTERS LOCAL UNION NO. 507,
a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.²

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full and regular part-time maintenance employees, senior wild animal keepers, assistant senior wild animal keepers, wild animal keepers, assistant wild animal keepers and regular

¹ Employer's name appears as amended at hearing.

² The Parties filed post-hearing briefs, which have been carefully considered. Upon the entire record in this proceeding, the undersigned finds: the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

seasonal wild animal keepers at the Employer's Akron, Ohio zoo, but excluding retail store employees, truck drivers, office clerical and confidential employees, professional employees, guards, and supervisors as defined in the Act.³

There are approximately 21 employees in the unit found to be appropriate.

The Employer operates a non-profit zoological park in Akron, Ohio, where it maintains a collection of animal life for exhibition and for the conservation, education, and protection of endangered species. There is no history of collective bargaining regarding the employees in the petitioned-for unit.

The Petitioner seeks to represent all of the animal keepers employed in the Employer's Collections Department as well as the maintenance employees employed in the Employer's Maintenance Department. The Employer raises two issues concerning the petitioned-for unit, both of which relate to the exclusion of certain animal keeper positions in the Collections Department:

ISSUES

1) Whether the Senior Wild Animal Keeper position should be excluded from the Unit because the individuals employed in that position are Section 2(11) supervisors as asserted by the Employer, contrary to the position of the Petitioner. Currently, the Employer employs four (4) full-time regular Senior Wild Animal Keepers.

2) Whether the Seasonal Wild Animal Keeper position should be excluded from the unit because it is a temporary position that does not share a community of interest with unit employees as asserted by the Employer, contrary to the position of the Petitioner. At present, one employee holds the seasonal wild animal keeper position.

³ Except for the senior wild animal keeper and seasonal wild animal keeper position, this unit description is in substantial accord with an agreement between the parties regarding employees appropriately included in the

I find that an appropriate unit should include the Senior Wild Animal Keepers and the Seasonal Wild Animal keeper positions and, therefore, I conclude that these positions should be specifically included in the bargaining unit description.

FACTS

The Zoo's operations are organized into four main areas: Business & Finance, Living Collections & Grounds, Communications and Projects and Planning. Each of these areas is overseen by either an operational Vice President or Director. Each of these Vice Presidents reports to the President and CEO who, in turn, reports to the Zoo's Board of Trustees.

The Living Collections and Grounds department is responsible for veterinary care, animal care, records, building, grounds and security. With respect to animal care, the Curator of Husbandry oversees animal care operations and reports directly to the Vice President of Collections & Grounds. The Zoo recently established two Animal Care Supervisor positions that have department level responsibilities over animal care including the supervision of the Zoo's wild animal keepers.⁴ Animal care duties are divided among four animal care stations. Each of these animal care stations is staffed by one of the Zoo's four Senior Wild Animal Keepers. Depending on the animal care requirements of each station, the stations are staffed by animal keepers of varying levels. These include the Assistant Senior Wild Animal Keepers, Wild Animal Keepers and Assistant Wild Animal Keepers.

SENIOR WILD ANIMAL KEEPERS

The Senior Wild Animal Keepers ("SWAKs") are primarily responsible for animal care and maintenance of the animals at their particular stations. Like the other wild animal keepers assigned to a station, SWAKs take part in the daily care, feeding and cleaning of the animals. Animal care assignments are determined by Station Servicing Guidelines. The Station Servicing

bargaining unit.

⁴ At the present, one of the Animal Care Supervisor positions is unfilled.

Guidelines set forth the station staffing needs and the various assignments and routines that are required for animal care. The Station Servicing Guidelines are generally formulated by SWAKs on a seasonal basis and whenever a new animal is acquired or transferred to the Zoo. Generally, SWAKs rely upon instructions from the Animal Care Supervisors or the Zoo's Veterinarian in formulating the Station Servicing Guidelines. In circumstances where an animal is acquired from another institution, the prior care instructions for the particular animal are utilized in formulating the Station Servicing Guidelines.

The Station Servicing Guidelines include daily animal feeding and maintenance schedules as well as other periodic assignments that the animal keepers must perform. While the guidelines are formulated by SWAKs, both the Curator of Husbandry and the Zoo's veterinarian must approve the guidelines. All of the Zoo's animal keepers including the SWAKs carry out the various tasks and assignments set forth in the guidelines. The evidence reflects that SWAKs spend approximately 80% of their time carrying out tasks related to animal care and roughly 20% of the work time planning the Station Servicing Guidelines. The evidence further reflects that most of the assignments and duties set forth in the Station Servicing Guidelines are daily, routine tasks involving feeding and cleaning of the animals.

While the Station Servicing Guidelines dictate staffing levels at each animal care station, SWAKs are not involved in scheduling, or in the approval of sick leave or vacation requests by subordinate animal keepers. These are the responsibility of the Curator of Husbandry. Furthermore, SWAKs must ask the Curator to approve any transfer requests when additional manpower is required at a particular animal care station.

With respect to overtime, SWAKs must seek the approval of either the Animal Care Supervisor or Curator in order to seek overtime hours on behalf of subordinate keepers. In limited circumstances when neither the Curator nor other management is on-duty, SWAKs can

approve overtime requests for their keepers but must provide the Curator with explicit reasons the following day as to why the overtime was necessary.

With respect to discipline, both SWAKs and Assistant SWAKs factually document any misconduct by other animal keepers in the form of incident reports. While SWAKs retain the incident reports in a personnel log and can verbally counsel a subordinate keeper for misconduct, any issuance of discipline beyond a verbal warning is done by the Animal Care Supervisor, the Curator, the Vice President of Collection & Grounds or the Zoo's President and CEO.⁵ The evidence reflects that SWAKs do not attend subordinate keepers disciplinary meetings and are not privy to the disciplinary records of those keepers who report to their stations.

With respect to evaluations, both Assistant Senior Wild Animal Keepers and SWAKs, through the Employer's Mentoring Program, are expected to meet on a monthly basis with staff who are assigned to their station and to provide subordinate employees with feedback as to their job performance. SWAKs are expected to take monthly minutes recording feedback provided to employees.⁶ These minutes are then collated by the Curator who meets with employees for their annual performance evaluation.⁷ These performance evaluations are used for merit pay increases. The evidence reflects that SWAKs neither conduct nor sign-off on employees' annual performance evaluations. SWAKs also do not make any recommendations as to whether an employee should receive a pay raise, promotion or demotion.

With respect to the hiring, SWAKs participate in the interview process for both superior and subordinate employees. SWAK participation, however, is limited to interview panels which always include either the Curator, Registrar or Vice President of Collections & Grounds.

⁵ Pursuant to the Zoo's disciplinary policies, SWAKs can give up to three verbal warnings to subordinate keepers before the disciplinary matter is elevated for handling by the Animal Care Supervisor and Curator.

⁶ The evidence reflects that SWAKs as well as other levels of animal keepers submit feedback to the Curator for purposes of employees' annual performance evaluation.

⁷ The evidence reflects that in the annual performance evaluation, the Curator provides feedback that is separate and distinct from SWAKs comments collated in the evaluation.

However, during panel interviews, SWAKs are permitted to ask prospective employees questions but in some instances these are scripted by the Curator. Generally, SWAKs provide upper level management with their opinions as to whether they could work with a prospective candidate as well as a recommendation as to whether a candidate should be hired. The evidence, however, reflects occasions where a SWAK's recommendation not to hire an Assistant Senior Wild Animal Keeper candidate was not followed and that individual was hired by the Zoo. As for personnel above the level of SWAKs, the Zoo utilizes a two step interview process. SWAKs are invited to attend the initial interview which appears, at best, to be an informal meeting with the candidate where the SWAK and other Zoo representatives have the opportunity to meet and greet the candidate. Upper level Zoo management conducts the second, more formal interview. Given that SWAKs do not participate in this interview, it is clear they do not make any effective recommendation to hire superior employees.

The evidence reflects several similarities between the SWAKs and other animal keepers. All of the animal keepers including the SWAKs are hourly employees and eligible for overtime. SWAK's immediate supervisors – the Animal Care Supervisors -- are salaried and are overtime exempt. SWAKs and the other animal keepers are required to use a time clock to punch in and out. Animal Care Supervisors do not use a time clock. Since April of 2002, SWAKs have not attended meetings involving Collections & Grounds managers. Since that time, SWAKs participate in a weekly meeting with the Curator to discuss various animal care related issues.

SEASONAL WILD ANIMAL KEEPER

Presently, the Zoo employs one employee as a Wild Animal Keeper who has been hired to work 40 hours per week from October 2003 through April 2004. This Seasonal Wild Animal Keeper performs essentially the same job duties as other regular part-time Wild Animal

Keepers.⁸ The only distinction, however, is that the Seasonal Wild Animal Keeper does not receive certain employee benefits, including health insurance, that are offered to all other regular full and part-time animal keepers. Evidence was presented that the Seasonal Wild Animal Keeper position cannot be extended beyond six months. However, the Vice President of Collections & Grounds informed the staff of animal keepers that the individual employed in the seasonal position could be re-hired for that position once her six-month period is completed.

ANALYSIS

SUPERVISORY STATUS OF THE SENIOR WILD ANIMAL KEEPERS

Section 2(3) of the Act excludes from the definition of “employee” an individual employed as a “supervisor.” Section 2(11) of the Act defines supervisor as follows:

The term “supervisor” means an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The definition of Section 2(11) is phrased in the disjunctive such that the possession of any one of the enumerated supervisory criteria or the authority to effectively recommend it, so long as the performance of that function is not routine and requires independent judgment, provides a sufficient basis for finding supervisory authority. **Mississippi Power & Light Co.**, 328 NLRB 965, 969 (1999), citing **Ohio Power Co. v. NLRB**, 176 F. 2d 85, 87 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); **Clark Machine Corp.**, 308 NLRB 555 (1992); **Bowne of Houston, Inc.**, 280 NLRB 1222, 1223 (1986).

The Board analyzes the enumerated statutory indicia on a case-by-case basis to determine the supervisory status of employees. **Providence Hospital**, 320 NLRB 1717 (1996), **enfd.** 121 F. 3d 548 (9th Cir. 1997). The Board and courts refrain from construing supervisory status too

⁸ The evidence reflects that the Seasonal Wild Animal Keeper and part-time Wild Animal Keepers cannot work with

broadly because the ramifications of any expansive construction would deny individuals from protections under the Act. See, e.g., Holly Farms Corp v. NLRB, 517 U.S. 392, 399 (1996); Edward Street Daycare Center, Inc. v. NLRB, 189 F.3d 40 (1st Cir. 1999); Williamson Piggly Wiggly v. NLRB, 827 F. 2d 1098, 1100 (6th Cir 1987). Accordingly, the party asserting supervisory status has the burden of proving that the individual is a supervisor. Kentucky River Community Care, Inc., 523 U.S. 706 (2001).

Mere assertions of authority are not sufficient to establish supervisory status. Chevron U.S.A., 309 NLRB 59 (1992). Moreover, conclusory evidence, “without specific explanation that the [disputed person or classification] in fact exercised independent judgment,” does not establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991). Any lack of evidence in the record is construed against the party asserting supervisory status. Williamette Industries, Inc., 336 NLRB No. 59, slip op. p.1 (2001); Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn. 8 (1999).

The employer’s delegation of managerial authority determines whether an individual is a statutory supervisor. Accordingly, in every case, it is question of fact whether an individual is merely a superior worker or lead, “or is a supervisor who shares the power of management.” See NLRB v. Souther Bleachery & Print Works, Inc., 257 F. 2d 235, 239 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959). As in each case, the Board must determine what authority had in fact be delegated and what retained.

In deciding whether the individuals have been delegated meaningful responsibility to “responsibly direct” employees with “independent judgment”, the Supreme Court in NLRB v. Kentucky River Community Care, 532 U.S. 706, 720 (2001) has suggested that the Board distinguish between directing “tasks” (nonsupervisory direction) as compared to directing

“employees” (supervisory direction). In the instant case, the carrying out of the Station Servicing Guidelines at each of the stations mainly involves the SWAKs’ assignment of routine and repetitive tasks that are carried out by animal keepers for animal care needs. The evidence reflects that these routines are fairly regular and are changed by SWAKs only on a seasonal basis. The Board has held that routine and repetitive tasks seldom require the purported supervisor to exercise independent judgment. See, **Beverly Health and Rehab. Servs., Inc.**, **335 NLRB 635, 669 (2001)** (finding that LPNs at nursing homes whose duties were performed in the same manner for the same people day in and day out do not require independent judgment). Furthermore, the Board found that responsibilities in isolated instances that are unlikely to recur and are not a part of an individual’s normal job duties does not constitute supervisory authority. **Springfield Jewish Nursing Home for the Aged, Inc.**, **292 NLRB 1266, 1267 (1999)** (finding that a nurse did not become a supervisor because of responsibilities during a fire). While the SWAKs take on a leadership role during situations when animals escape and when no other management personnel is available at the zoo, the evidence suggest that such these circumstances rarely.

Conversely, with respect to the authority to assign work to employees, the Board has held the power to assign is not supervisory if the alleged supervisor lacks any significant discretion because of the routine nature of the work. The Board, in several cases, has found that work deemed so routine that the purported supervisor does not differentiate between employee skill levels, the individual in question has been found to be nonsupervisory. See e.g., **Esco Corp.**, **298 NLRB 837, 839 (1990)** (finding that the assignment of work was not an indicia of supervisory status because assignments were “not based on the level of employee skill but on the need to get the work done”); **Patagonia Bakery Co.**, **339 NLRB No. 74, slip op. at 1 n. 1, 20-21 (2003)** (telling employees what discrete tasks to perform is routine assignment or direction

where there is “no evidence that any of the jobs assigned...requires any particular skills, nor that the abilities of any of the employees who perform the jobs differed substantially, such that selecting a particular employee for a task would require independent judgment”). In the instant case, the evidence reflects that the SWAKs simply divide up tasks set forth in the Stations Servicing Guidelines among the animal keepers assigned to their station. SWAKs exercise no control over the staffing of each particular station. Further, there is no evidence that SWAKs select certain animal keepers to perform a particular animal feeding or maintenance task based upon their level of skill.

The evidence further reflects limited circumstances where SWAKs have authority to approve overtime hours for animal keepers. Usually, SWAKs must seek the approval of the Curator and/or the Animal Care Supervisor in order to allow employees to work overtime. However, in limited situations where there are no supervisors or managerial employees on duty, SWAKs can approve overtime hours. In these situations, SWAKs are required to justify the use of overtime to the Curator the following day. The limited situations where SWAKs have authority to approve overtime do not appear to occur with any regular or substantial frequency. Accordingly, I find that SWAKs lack sufficient independent discretion to approve employee overtime requests.

With regard to disciplinary authority, the record reflects that SWAKs perform merely a reportorial function in documenting observed incidents of misconduct committed by animal keepers. SWAKs disciplinary authority extends, at most, to verbal counseling issued to subordinate employees.

It is well established that oral warnings which simply bring to an Employer’s attention substandard performance without any recommendation for discipline, and where an admitted statutory supervisor, such as the Curator here, makes an independent assessment of the

employee's conduct, constitute nothing more than a reporting function. **Providence Hospital**, 320 NLRB 717, 729 (1996); **Passavant Health Ctr.**, 284 NLRB 887, 889 (1987); **Mt. Airy Psychiatric Ctr.**, 253 NLRB 1003, (1981). Federal courts have similarly held that the mere reporting of situations to a superior who decides whether discipline is not supervision but rather is "advising and awaiting decisions from others." **VIP Health Services, Inc. v. NLRB**, 164 F. 3d 644, 648 (D.C. Cir. 1999); **NLRB v. Dickerson-Chapman, Inc.**, 964 F. 2d 493 (5th Cir. 1992). Based upon the foregoing, the evidence establishes that SWAKs disciplinary authority does not rise to the level of statutory supervisory authority.

With respect to hiring employees, the evidence reflects that SWAKs have the opportunity to offer input about prospective candidates. Typically, the SWAKs are involved in the first round of a panel interview for prospective candidates and offer feedback to upper management as to whether the SWAK could work with a particular candidate. While the evidence reflects that SWAKs participate in the hiring process, they do not make an effective recommendation on whether to hire an applicant. I note that the record here describes situations where candidates have been hired by the Employer despite a SWAKs disapproval of the candidate during the hiring process. Accordingly, I find that the SWAK lack the level of authority on hiring decisions necessary for Section 2(11) supervisory status.

With respect to the evaluation of employees, the evidence reflects that SWAKs provide employees with monthly feedback which is then recorded in minutes. The record reflects that the monthly minutes request SWAKs to give employees a categorical rating based upon job expectations. The SWAK's monthly minute comments are then utilized by the Curator in providing employees' with annual performance appraisals. The evidence reflects that while the SWAKs comments are included in an employee's annual appraisal, these comments are sectioned separately from the Curator's comments and assessments. More importantly, the

record is silent with respect to the weight given to SWAKs' evaluations. Nor does the record indicate that SWAKs' evaluations directly correlate with raises or promotions received by animal keepers. **Vencor Hospital – Los Angeles, 328 NLRB 1136 (1999)** (finding lack of supervisory status where the employer failed to establish how much weight is given to nurses' reports in preparing employee evaluations). Accordingly, I find that the mentoring program evaluations conducted by SWAKs do not constitute effective recommendations to reward or promote employees to establish supervisory status.

Based on the foregoing and the record as a whole, I conclude that the SWAKs do not exercise independent judgment with regard to any factors establishing supervisory status under Section 2(11) of the Act. I shall therefore, direct an election, which includes the Senior Wild Animal Keepers within the Unit appropriate for collective bargaining.

ELIGIBILITY OF THE SEASONAL WILD ANIMAL KEEPER

The key factor for determining the eligibility of seasonal employees is regularity. Regular seasonal employees are those who have a reasonable expectation of re-employment in the foreseeable future and are thus, included in the bargaining unit. **L & B Cooling, 267 NLRB 1 (1983); P.G. Gray, 128 NLRB 1026 (1960)**. On the other hand, temporary or casual seasonal employees are excluded. **L & B Cooling, supra**. The evidence here reflects that the employee employed in the Seasonal Wild Animal Keeper position has a six-month term of employment. While the Employer has presented evidence that this position cannot extend beyond the fixed six month period, there is also evidence that this employee could be re-hired for another six month term. Indeed, it appears from the record, specifically the statement of the Zoo's Vice President to the staff, that this employee has a reasonable expectancy of continued employment for this position. The Board has found that temporary employees who are retained beyond their original term of employment are included within the unit. **Tol-Pac, Inc., 128 NLRB 1439 (1960)**.

Given that this seasonal wild animal keeper has the same duties, working conditions and supervision as other employees contained in the unit, I conclude that this Seasonal Wild Animal Keeper position should be included within the unit appropriate for collective bargaining.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees of the Akron Zoological Park in the bargaining unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Teamsters Local Union No. 507 a/w International Brotherhood of Teamsters**.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access

to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 18, 2004.

DATED at Cleveland, Ohio this 4th day of March 2004.

/s/ Frederick Calatrello
Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

177-8520-0100
177-8520-0800
177-8580-8400
177-2466